IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-5856

Winston Holloway, Ray Lee Welch and
Gary Don Campbell ..... *Petitioners*

vs.

State of Arkansas ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Arkansas (Pet. App. A) is reported at 260 Ark. ____, 539 S.W. 2d 435 (July 10, 1976).

JURISDICTION

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The question presented is whether the three defendants were denied effective assistance of counsel by the order of the

trial court appointing the Public Defender to represent them in the same trial over their objection.

STATEMENT OF THE CASE

In the early morning hours of June 1, 1975, three men robbed the Leather Bottle Restaurant in Little Rock. During the course of the robbery two female employees were raped.

The defendants were arrested at different times and placed in separate line-ups at different times, and identified by the five witnesses who were in the Leather Bottle. Appellant Campbell made an oral statement incriminating himself and the two other appellants in the crimes. The statement was used against him at trial, but all references to the other appellants were deleted.

The Public Defender was appointed to defend all three defendants who were tried jointly because they were not charged with a capital offense. Ark. Stat. Ann. §43-1802 (Repl. 1964). The counsel for appellants made a motion for separate counsel citing a possible conflict of interest in representing defendants who might attempt to incriminate one another. This motion was denied and the purported conflict never arose at trial.

On September 4, 1975, the defendants were brought to court in their jail clothing and so appeared in front of the prospective jurors. Appellants moved for a mistrial based on this incident. The trial court denied that motion but offered appellants the opportunity to change clothes before the trial began. Appellants ignored this offer and proceeded to trial.

On September 5, 1975, the jury returned a verdict of guilty

against each defendant and sentenced each of them to life imprisonment on each of the two charges of rape and to 21 years for robbery.

On July 19, 1976, the Arkansas Supreme Court affirmed the petitioners' convictions. On September 20, 1976, that Court entered its final judgment upon denying rehearing.

POINTS TO BE RELIED UPON

I.

THE THREE DEFENDANTS WERE NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

II.

THIS COURT SHOULD NOT ADOPT A RULE WHEREBY REPRESENTATION OF MULTIPLE DEFENDANTS BY SINGLE COUNSEL IS PER SE UNCONSTITUTIONAL, NOR SHOULD THIS COURT ADOPT A RULE WHEREBY THE DETERMINATION OF WHETHER THERE IS IN FACT A CONFLICT IS MADE BY THE DEFENSE ATTORNEY ALONE.

III.

THE DECISION SHOULD ULTIMATELY REST WITH THE TRIAL COURT.

ARGUMENT

THE THREE DEFENDANTS WERE NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE PUBLIC DEFENDER WAS APPOINTED TO REPRESENT THEM IN THE SAME TRIAL OVER THEIR OBJECTIONS.

It has long been held that:

> "... the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Glasser* v. *United States*, 315 U.S. 60, 70 (1942).

This language stands on its own footing, and it should be noted that it does *not* stand for the proposition that the representation of multiple defendants by a single attorney amounts to a per se deprivation of their Sixth Amendment right. *United States* v. *Carrigan*, 543 F. 2d 1053, 1055 (2nd Cir. 1976); *United States* v. *Huntley*, 535 F. 2d 1400, 1406 (5th Cir. 1976); *United States* v. *Donner*, 497 F. 2d 184, 196 (7th Cir. 1974); *United States ex rel Hart* v. *Davenport*, 478 F. 2d 203, 210 (3rd Cir. 1973); *United States* v. *Williams*, 429 F. 2d 158, 160, 161 (8th Cir. 1970); *Watkins* v. *Wilson*, 408 F. 2d 351, 352 (9th Cir. 1969); *Fryar* v. *United States*, 404 F. 2d 1071, 1073 (10th Cir. 1968), cert. den. 395 U.S. 964 (1969).

Thus, it can be said that in order for there to have been a deprivation of the right to effective counsel there must be a conflict between the interests of the co-defendants. This conflict is not of an imaginary or hypothetical nature, *Foxworth* v. *Wainwright*, 516 F. 2d 1072 F.N. 7 at 1077 (5th Cir. 1975);

Jackson v. *United States,* 404 F. Supp. 1134, 1137 (E.D. Pa. 1975); but, rather, the general rule employed requires that some specific instance of prejudice must be shown to exist; *United States* v. *Lovano,* 420 F. 2d 769, 773, F.N. 14 at 774 (2nd Cir. 1970); *United States* v. *Mandell,* 525 F. 2d 671, 677 (7th Cir. 1975); *Marxuach* v. *United States,* 398 F. 2d 548, 551, 552 (1st Cir. 1960), cert. den. 393 U.S. 982 (1960); *Lugo* v. *United States,* 350 F. 2d 858, 859 (9th Cir. 1965); *United States* v. *Carrigan,* supra, 543 F. 2d at 1055; *United States* v. *Burkeen,* 355 F. 2d 241, 244 (6th Cir. 1966), cert. den. sub nom. *Matlock* v. *United States,* 384 U.S. 957 (1966); *American-Canadian Oil and Drilling Corp.* v. *Aldridge and Stroud,* 237 Ark. 407, 410, 373 S.W. 2d 148 (1963); *State* v. *Alexander,* 334 S. 2d 388, 391 (La. 1976); *People* v. *St. Pierre,* 25 Ill. App. 3rd 644, 324 N.E. 2d 226, 231 (1975).

In the case at bar, petitioner Campbell made a pretrial confession which implicated the co-defendants, and a pretrial *Denno* hearing on its admissibility was held, wherein the trial court admitted the statement as to Campbell and ordered the names of the co-defendants struck. Prior to the hearing, petitioner's counsel filed a motion for the appointment of separate counsel, based upon the assertion that "there is a *possibility* of a conflict of interest in each of their cases . . ." (Appendix 10) (Emphasis supplied) At the close of the hearing, the petitioner's attorney orally renewed his motion for separate counsel, stating "one or two of the defendants may testify, and if they do I will not be able to cross-examine them because I have received confidential information from them." (Appendix 22)

The Petitioner's motions indicated nothing more than a *possibility* of conflicting interests here. There is always the *possibility* of conflicting interests in any case with joint defendants and the existence of more than such possibility is required

to establish a deprivation of the Sixth Amendment right. *United States* v. *Gallagher,* 437 F. 2d 1191, 1194 (7th Cir. 1971), cert. den. 402 U.S. 1009 (1971); *United States* v. *Lovano,* supra. *American-Canadian Oil and Drilling Corp.* v. *Aldridge and Stroud,* supra; *United States* v. *Mari,* 526 F. 2d 117, 119 (2nd Cir. 1975;. Clearly the petitioners have not demonstrated that there was an actual or even a substantial possibility of a conflict of interest.

That there was no conflict of interest among the petitioners is further supported by the fact that all of them took the stand and the record reflects the gist of testimony to be as follows:

> "(1) Winston Holloway alleged, in accordance with the testimony of his brothers, that he was at his brother's home during the time of the robbery-rape incident caring for his brother who was recuperating from surgery; and
>
> (2) Ray Lee Welch testified that he was at home during the entire night of the crime with his half-brother, co-defendant Gary Don Campbell; and
>
> (3) Gary Don Campbell testified that he had never been to the restaurant where the robbery-rape took place, that he had never made a contrary statement to the police about his complicity and that he did not know Winston Holloway by name."

All of the petitioners testified that the victims lied when they made positive identification of them as the perpetrators of the crimes. (Appendix 26-33)

The record further reflects that all of the petitioners pursued an alibi defense and neither the petitioners nor their

counsel indicated that there was a conflict among the defenses. Also they did not demonstrate that they were precluded the use of any plausible defense nor any defense at all for that matter.

These matters are certainly not sufficient to find that petitioners were denied their right to effective assistance of counsel. While the evidence may have been stronger as to Petitioner Campbell due to the introduction of his statement, "the mere fact that the evidence could be said to be stronger against one co-defendant than another does not indicate, much less demonstrate the existence of a conflict of interest among the defendants." *United States* v. *Donner*, supra, 497 F. 2d at 196; *United States* v. *Gallagher*, supra, 437 F. 2d at 1194; *United States* v. *Mandell*, supra, 525 F. 2d at 677, 678.

The fact that the petitioners employed compatible defenses coupled with the absence of any contention that they were precluded the use of any plausible defense further substantiates the fact that they were not deprived the effective assistance of counsel. *Foxworth* v. *Wainwright*, supra, 516 F. 2d at 1079; *United States ex rel Small* v. *Rundle*, 442 F. 2d 235, 238 (3rd Cir. 1971); *United States* v. *Huntley*, supra, 535 F. 2d at 1406; *Ware* v. *Commonwealth*, 537 S.W. 2d 174, 177, 178 (Ky. 1976); *State* v. *Alexander*, supra, 334 S. 2d at 391; *People* v. *Gomberg*, 38 N.Y. 2d 307, 379 N.Y.S. 2d 769, 342 N.E. 2d 550, 553 (1975); *Jones* v. *State*, 527 P. 2d 169, 175 (Okla. Cr. 1974); *People* v. *St. Pierre*, supra, 324 N.E. at 231.

The petitioners contend that they made no revelation to the trial court of any facts which would show a conflict because such information was confidential. In this regard, the respondent notes that Disciplinary Rule 4-101(c)(2) provides that "A lawyer may reveal confidences or secrets when permitted under

the Disciplinary Rules or required by law or court order." Certainly, where any confidential information may be necessary to establish the existence of a conflict of interest, the revelation of such to the trial court in an *in camera* proceeding could easily be said to be within the ambit of DR 4-101(c)(2).

The respondent also notes that this topic was touched on by the court in *United States* v. *Jeffers*, 520 F. 2d 1256, 1262, 1265 (7th Cir. 1975), and was noted by the Arkansas Supreme Court in its opinion at the case at bar:

> "Thus, if defense counsel was concerned that he might be using confidential information improperly, he could have outlined the nature of the information to the judge and, if necessary, made an *in camera* disclosure to him. On the basis of such a disclosure it might have become apparent that the privilege was either inapplicable or had been waived by the witness. Or it might have been clear that the information was not usable for other evidentiary reasons."

Holloway, Welch and Campbell v. *State*, 260 Ark. ____, 539 S.W. 2d 435, 440 (1976).

The Amicus on behalf of the National Legal Aid and Defender Association raises the contention that the admission of Campbell's confession inculpates both Holloway and Welch and operated to deny both Holloway and Welch their right of confrontation to attack that part of the confession involving them, pursuant to *Bruton* v. *United States*, 391 U.S. 123 (1968). It should be initially noted that both Holloway and Welch's names had been deleted from the confession and it could not be said to inculpate them. The contention raised by the Amicus is based upon the hypothesis that had there been separate

counsel, Campbell would have admitted making the confession and would have proceeded under a defense that it was his two co-defendants who raped the victims and he was therefore less culpable.

The respondent notes that such a contention is mere speculation and nothing more and one could engage in such speculation and hypothesis on almost any issue arising at trial. The respondent would further point out the fact that there is nothing in the record which bears out the Amicus contention; indeed, the record disclosed that Campbell pursued the same defense, denial of the statement at his Denno hearing several days prior to trial.

In summation, the State of Arkansas requires a showing of something more than a mere *possibility* of conflicting interests among co-defendants in order to find a deprivation of the right to effective counsel. There is then a duty upon counsel requesting the appointment of multiple counsel to identify with specificity the nature of the conflict that will arise. In this regard, Arkansas is in accord with the bulk of appellate jurisdictions. *United States* v. *Williams,* supra; *Foxworth* v. *Wainwright,* supra; *United States* v. *Mandell,* supra; *Marxuach* v. *United States,* supra; *United States* v. *Lovano,* supra.

The record in this case indicates that the petitioners failed to meet their burden of identifying the specific nature of the conflict and/or that conflict actually did exist. The record reflects that the petitioners did not claim that they were deprived of any plausible defense or denied any defense for that matter; the record further reflects that the petitioners had alibi defenses which were concurring and complementary. This in numerous jurisdictions have found such a situation to deny the existence of

an actual conflict. *Gonzales* v. *United States,* 314 F. 2d 750 (9th Cir. 1973); *People* v. *Spencer,* 45 Mich. App. 440, 206 N.W. 2d 733 (1973); *State* v. *Andrews,* 106 Ariz. 372, 476 P. 2d 673 (1970); *Commonwealth* v. *Heard,* (Pa. Super 1973) 303 A. 2d 831. The record reflects that the petitioners offered merely their conclusion that conflict existed, rather than any facts on which the trial court could have based such a decision.

Clearly, the lower court did not err in ruling that the petitioners were not denied their Sixth Amendment right to effective counsel.

II.

THIS COURT SHOULD NOT ADOPT A RULE WHEREBY REPRESENTATION OF MULTIPLE DEFENDANTS BY SINGLE COUNSEL IS PER SE UNCONSTITUTIONAL, NOR SHOULD THIS COURT ADOPT A RULE WHEREBY THE DETERMINATION OF WHETHER THERE IS IN FACT A CONFLICT IS MADE BY THE DEFENSE ATTORNEY ALONE.

The Amicus from the State of Colorado does not deal with the facts of the case, but rather, states that this Court should adopt a rule whereby representation of multiple defendants by a single attorney is a per se deprivation of the Sixth Amendment right to effective counsel. The respondent submits that such a suggestion is not warranted by the Constitution; indeed, such a rule would amount to "burning down the barn to get rid of rats."

The Sixth Amendment to the United States Constitution guarantees each criminal defendant the right to effective

counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932). In *Glasser* v. *United States*, supra, this Court pronounced the rule that there could be no effective counsel in situations where the *counsel must simultaneously represent conflicting interests*. *Glasser* v. *United States*, supra, 315 U.S. at 70. (Emphasis supplied) The Court did not say that single counsel's representation of multiple defendants was *per se* unconstitutional and we know of no jurisdiction, nor has the Amicus cited to any, which so hold.

Therefore, it is *only* when in the course of such a relationship that a conflict is shown to exist between the interests of the defendants so that counsel is forced to compromise to the extent that one or more of the defendants is prejudiced, that the defendants are denied their right of effective assistance in counsel. Thus, it is only when a conflict of interest exists that prejudice can be said to inure and it is that prejudice resulting from the conflict which effectuates the deprivation of effective counsel.

If the Amicus from Colorado were to suggest that there should be a presumption that multiple representation is unconstitutional and the burden is on the state to prove otherwise, it could be said that he was putting the cart before the horse. Amicus advocates a rule, however, that would not allow the state to prove such, and he therefore seems to suggest that the cart would not work, save being pushed by an entire team of horses.

The entire argument of Amicus is centered upon his fallacious assumption that there is *always* a conflict in every criminal case involving multiple defendants. We believe, along with the overwhelming majority of jurisdictions, that such assumption paints with too broad a stroke.

The Amicus argument bases a goodly portion of his argument upon § 3.5(b) of A.B.A. standards for Criminal Justice, standards relating to the defense functions.

While respondent recognizes the importance of § 3.5(b), it is clear that the standard espoused by it does not amount to a rule that representation of multiple defendants by one attorney is per se unconstitutional, nor does it amount to a constitutional mandate. In fact, the American Bar Association standards assert its own latitude. See, *United States ex rel Robinson* v. *Housewright*, 525 F. 2d 988, 994 (7th Cir. 1975).

The Amicus also suggests that the refusal of this Court to adopt the rule which he is advocating would amount to a denial of Equal Protection under the law in violation of the Fourteenth Amendment to the United States Constitution. He bases his conclusion upon the invalid premise that retained counsel may withdraw from a case at any time, while appointed counsel may not. That this premise is invalid is borne out by a myriad of cases which hold retained and appointed counsel to be on equal footing in this area. See, generally, *Anders* v. *California*, 386 U.S. 738 (1967); *Waits* v. *McGowan*, 516 F. 2d 203 (3rd Cir. 1975); *Brown* v. *Joseph*, 463 F. 2d 1046 (2nd Cir. 1972); *Lessenberry* v. *Adkisson and Howard*, 255 Ark. 285, 294, 295, 296, 297, 298, 499 S.W. 2d 835 (1973); *Riley* v. *District Court In and for the Second Judicial District*, 181 Col. 90, 507 P. 2d 464, 465 (1973); and *Ex Parte Mays*, 152 Tex. Crim. 172, 212 S.W. 2d 164 (1948).

The respondent would once again note that the key issue here is whether conflict exists between the interests of the co-defendants and where such is established, courts have not hesitated to direct a reversal. *United States* v. *Williams*, supra, 429 F. 2d at 161.

There can be no doubt that the rule suggested by the Amicus from Colorado would *lessen* the claims of denial of effective counsel in cases where one attorney represented multiple defendants. We use the word "lessen" because respondents realize that under Amicus' rule where joint representation is allowed after waiver, the claims would arise that the waiver was not voluntary or was otherwise tainted. The respondents would state, however, that the rule espoused is both unjustified and unwarranted and therefore we cannot subscribe to such a rule.

The Amicus for the National Legal Aid and Public Defender Association, on the other hand, realized that some conflict of interest must be shown to exist before there can be a deprivation of the right to effective counsel. Amicus suggests a rule whereby the responsibility for ascertaining the existence of such conflict rests with the defense attorney, who, upon finding the existence of such, would consult with this client and then withdraw. The problem with this proposed rule is that it would not involve the trial court.

The Amicus states that such rule is mandated for several reasons:

> (1) The Amicus suggests as reason for adoption of this rule that it is often impossible to identify specific conflicts until very near the date of trial. The respondent suggests that a determination that there is a conflict at a time very near the trial date would pose no greater hindrance to the trial court than it would the defense counsel. The Amicus states that the delay resulting from following the rule employed by the Arkansas courts would result in many trials being delayed due to the need for an eleventh hour counsel change. The respondent fails to see how this need would be

> any worse than if defense counsel himself determined that there was a conflict at the eleventh hour and suddenly announced that he was abandoning the case of a particular co-defendant at that time.

The key issue where a substitution of counsel is necessary is the protection of the accused's rights. It seems quite implicit that the steady supervision of the impartial trial court is necessary in order to insure that any last minute withdrawal is justified and to insure that the accused's rights are indeed protected.

> (2) The Amicus asserts that his suggested rule is mandated because the relevation of any confidential information would be a gross violation of an attorney's ethical obligations. Such reasoning automatically assumes that it is almost always necessary to impart confidential to the trial court in order to show that a conflict did in fact exist. The respondent does not believe such to be the case.

Additionally, the respondent points to DR 4-101 (c) (2) which states:

> "(c) a lawyer may reveal:
>
> . . .
>
> (2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order."

Certainly, any time confidential information was required to be imparted to the trial court in order for it to determine

whether a conflict did in fact exist, such could be said to be within the ambit of DR 4-101(c)(2).

Finally, the respondent notes there seems to be an underlying suggestion of Amicus that if counsel was forced to disclose some of his confidential information to the trial court, that such information would not remain confidential. In this regard, the respondent points to §§ 1.5 and 3.7(b) of the *ABA Standards Relating to the Function of the Trial Judge*, approved draft, 1972, wherein state respectively:

> 1.5 Duty to maintain impartiality.
> The trial judge should avoid impropriety and the appearance of impropriety in all his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
> 3.7 (b) The trial judge should refrain from making public comment on a pending case or any comment that may tend to interfere with the right of any party to a fair trial and should otherwise be familiar with ABA Standards, Fair Trial and Free Press, and implement them as required.

(3) The Amicus next contends that disclosing information to the court would be inherently prejudicial to the defense. The respondent agrees with Amicus that such might be the case if such disclosure were made in open court; it cannot so agree that such would be the case of done *in camera*.

In this regard, the Amicus states that the defendant will be prejudiced simply if the trial court is aware of the factors which lead counsel to seek withdrawal and the confidential information may reflect upon one of the defendants' credibility. Such is not the case.

Apart from the fact that not every determination of a conflict involves confidential information, and apart from the fact that the trial court is ethically bound to impartiality, the fact remains that trial courts are faced with identical situations daily in hearings to determine the admissibility of confessions pursuant to *Jackson* v. *Denno*, 378 U.S. 368 (1964). Certainly no more pressure or prejudice could be said to inure from the disclosure of facts creating a conflict of interest between co-defendants than that which flows from hearing the confession of a defendant prior to his trial. *Jackson* v. *Denno*, id., did not mandate that a judge who has determined that a confession was not constitutionally obtained and is therefore inadmissible, was thereby incompetent to hear the trial of the confessor; likewise, we find nothing impermissible in a court which has heard information which the defense attorney believes sufficient to establish a conflict of interest between co-defendants, hearing their trial on the merits.

(4) The Amicus next contends that his rule must be adopted because Arkansas' procedure makes appellate review impossible. Arkansas employs the procedure adopted by a great number of courts of appeal, and if Amicus' contention is valid, there would be no reported cases dealing with allegations of deprivation of the right to effective counsel due to multiple defendants and a single attorney.

Apart from this, the Amicus' contention is founded upon two invalid presumptions. The first of these is that

the possibility of leaking confidential information by the State is an insurmountable barrier to appellate review. While the respondent would admit that such a problem does exist, it does not follow that it is an insurmountable one.

In this situation, an analogy can be drawn to cases dealing with governmental secrets, whereby a showing of the evidence may be made in an *in camera* proceeding. After all parties are apprised of the evidence, the court may take any protective measures it sees fit to safeguard the interests of the government and the furtherance of justice. See, generally, *Federal Rules of Evidence,* 509 (Dec. 1976).

The second premise upon which the Amicus bottoms his contention is identical to that which he espoused in (3); i.e., that no court apprised of the facts giving rise to the alleged conflict of interests could ever preside over a fair trial of the individuals. This contention is meritless for the same reasons as stated in (3).

(5) The Amicus contends that it is neither necessary nor appropriate for defense counsel to identify the conflict of interest to the trial court before the defendants are entitled to representation by separate counsel, since the issue is the attorney's honest, but subjective, relief.

As supportive of his argument, he cites to the ethical considerations of the American Bar Association. It should be noted that the EC 5-14, 5-15- 5-17, while offering guidelines for ethical standards, they do not state that all multiple representations are unethical, and unconstitutional, rather, they merely serve to remind the attorney of the *potential* for ethical danger in that sort of situation. In order to invoke these guidelines, it must be shown that the interests of the defendants are conflicting or differing.

The Amicus next asserts that adoption of his rule is necessary since to refuse to do so constitutes an 'equal protection' denial for appointed counsel. He seems to base this contention upon the assumption that retained counsel may withdraw from a case at any time.

Such is patently not the case, as is pointed out in *Lessenberry* v. *Adkisson and Howard,* supra, 255 Ark. at 295, 296, where the court quoted from *Riley* v. *District Court in and for Second Judicial District,* 181 Cal. 90, 507 P. 2d 464:

> "... a motion by an attorney for leave to withdraw for any reason is addressed to the sound discretion of the court and like all motions, it may or may not be meritorious. For that reason, a burden rests with the moving party to prove to the court's satisfaction of legitimacy of the request, and when the petitioner either fails or refuses to do so, the court may properly deny the motion. ..."

The withdrawal of any attorney from a case is a serious matter and may be done not at counsel or client's whim but with the permission of the trial court. In that regard, the trial court has the duty to fully ascertain the justification for a counsel's withdrawal. It should be noted that when counsel representing multiple defendants contends that separate counsel should be appointed for at least one of his clients, necessitating his withdrawal as that person's counsel, the trial court likewise, has

the duty of ascertaining whether there is in fact adequate justification for that action.

In this regard, we note the language employed in the Introduction to the *A.B.A. Standards Relating to the Function of the Trial Judge:*

> "Representing the overriding social interest and change with the obligation to do exact justice according to law, the judge, of course, is expected to be a neutral factor in the interplay of adversary forces. . . . Given the mandate of neutrality the role of the judge is not that of a mere functionary to preserve order and lend ceremonial dignity to the proceedings as the central figure at the trial mantled with neutrality, it is the judge's responsibility to direct and guide the course of the trial in such a manner as to give the jury fair opportunity in the opposite actions of the adversary parties to reach an impartial result on the issue of guilt. The teaching of the history of common law nations is that the trial judge, adhering to his neutral role, should possess, nevertheless, power to curb both adversaries in order that independent courts be maintained for the rational enforcement of the rights of free men. Provided that he acts judicially and with due regard for the rights of the defendant, the trial judge should be empowered to clarify obscurity in issues or evidence, prevent unnecessary delay, and promote the expeditious, fair and dignified course of the trial." *ABA Standards Relating to the Functions of the Trial Judge, Introduction,* P. 3 (Approved, 1972).

With this in mind, we note that Amicus contends that the issue is not whether a judge would find a conflict but rather counsel perceives one to exist, and following his rule at that

point whenever in the proceeding the defense counsel makes his discovery the trial court has no choice but to halt everything and appoint separate counsel.

The respondent acknowledges that whenever a conflict is found, a remedy is immediately mandated, be it appointing separate counsel, or the granting of a new trial. Amicus noted that it is often late in the .proceedings before such conflict is found. Because of the grave ramifications upon the discovery of conflict and because of the definite devastating possibilities for abuse by unscrupulous counsel, the respondent submits there is all the more reason for requiring the impartial trial court be the one making the ultimate decision as to whether there is conflict.

The respondent submits that it is precisely for these reasons that the vast majority of jurisdictions place the ultimate decision of whether there is a conflict in the hands of the trial court. See, *United States* v. *Mandell,* supra, 525 F. 2d at 676; *United States* v. *Lovano,* supra, 420 F. 2d at 774, fn. 14; *Holloway, Welch and Campbell,* supra, 539 S.W. 2d at 439.

III.

THE DECISION SHOULD ULTIMATELY REST WITH THE TRIAL COURT.

The respondent would agree with the National Legal Aid and Defender Association that the primary responsibility for the ascertainment and avoidance of conflict situations must lie with members of the bar. The rule suggested by the respondent, however, would not stop there, but would state that the attorney, believing that he has ascertained such, must notify and inform his clients and the trial court. At that point, the trial

court would hold an *in camera* hearing, wherein the attorney would disclose sufficient facts to the court upon which to make its decision.

If the trial court then found that a conflict was shown, it would then appoint separate counsel. If the trial court did not find a conflict to exist and the appellants disagreed with that decision, the trial would continue if in progress and the matter would be covered as a point in the defendants' appeal, should they be convicted; if the point were raised prior to trial, the matter could be covered by way of petition for certiorari to the appellate court.

CONCLUSION

For the reasons set forth herein, respondent respectfully prays that the decision of the Arkansas Supreme Court be affirmed and the conviction upheld.

Respectfully submitted,

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